IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 337

ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT THEREOF, ET AL., *Petitioners*,

v.

SHELTON PITNEY AND WALTER P. GARDNER, TRUSTEES OF CENTRAL RAILROAD CO. OF NEW JERSEY, ET AL., *Respondents*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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ARGUMENT.

The respondents, in urging the affirmance of the judgment of the Circuit Court of Appeals, have advanced several arguments to which the petitioners reply as follows:

I. The Circuit Court correctly held that the displacement of road conductors with yard conductors did involve a change in working conditions within the sweep of the Railway Labor Act.

A. The O.R.C. does not base its right to man the drills in controversy solely upon its March 7, 1940, agreement with the carrier.

The carrier[1] argues in its brief (p. 17) that the 1943 agreement between the carrier and BRT did not change working conditions but merely reaffirmed agreements made many years before. The best answer to this argument is that the Circuit Court found otherwise.[2] It held that the "proposed displacement of road conductors with yard conductors did involve a change in working conditions, within the sweep of the Railway Labor Act" (R. 59).[3] Moreover, no stronger proof is needed that working conditions have indeed been changed than the fact that presently the drills in controversy are manned by BRT yard conductors when for 35 or 40 years before it is undisputed they were manned by ORC road conductors.

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[1] The trustees for the carrier are referred to herein as the "carrier".

[2] Neither the carrier nor BRT sought a review in this court of the Circuit Court's finding.

[3] The carrier rather obliquely attacks the correctness of the Circuit Court's finding by citing *Anderson* v. *Abbott*, 321 U. S. 349. That case held that this Court will not examine evidence as to a finding of fact, in the absence of a clear error, where the same finding of fact has been made by both the District Court and the Circuit Court. Plainly, then, such case is not in point since here the Circuit Court reversed the Master and the District Court on the question of whether there had been a change in working conditions. Moreover, a brief reference to the Master's report clearly demonstrates that he was not making simple findings of fact like those referred to in the *Anderson* case. Rather, his conclusions were predicated upon his construction and interpretation of Rules 28 and 34, of the carrier's basic agreements with BRT and ORC, respectively, thus plainly showing that he was making conclusions of law and not findings of fact (R. 41-43).

In support of its contention that the Circuit Court erred in holding that there was a change in working conditions, the carrier argues that this holding must be predicated solely upon the March 7, 1940, agreement and in this connection argues that the O. R. C. bases its right to man the road drills in controversy solely upon such agreement. (Carrier's brief, pp. 14-15.)

This is a wholly erroneous statement of O. R. C.'s contention. O. R. C. has never contended that its right to the road drill jobs in question existed *solely* by virtue of the 1940 agreement. In its petition to the District Court the O. R. C. stated that the agreement of March 7, 1940, effected no change in working conditions for the operation of the drills in controversy but merely continued working conditions that had been in existence for more than 35 years (R. 2). Further, in O. R. C.'s opening statement to the Master it stated with reference to the 1940 agreement:

> "... all the management did at that time was to confirm what was the clear right under existing contracts and existing schedules, to wit, that there would be no reclassification of road conductors' service without agreement with the duly accredited representatives of the road conductors." (Rec. of App.; C. C. A., p. 92.[4])

Thus, from the very inception of this litigation, O. R. C. has contended that the 1940 agreement merely reiterated and preserved its rights acquired by established practice and interpretation of its basic agreement. The opinion of the Circuit Court herein recognizes this to be the contention of the O. R. C., for in its finding that the proposed displacement of road conductors by yard conductors did involve a change in working conditions, the Circuit Court referred to the "contravention" of the basic agreement between O. R. C. and the carrier and not to the March 7, 1940,

[4] As explained in the B. R. T. brief, p. 17, footnote 1, a typewritten transcript of the testimony taken before the Master was filed with the Clerk of the Circuit Court and is now on file with the Clerk of this Court. We adopt the method of citing such transcript suggested by the B. R. T.

agreement. (R. 58.) That this finding is wholly sound is shown by the fact that O. R. C.'s basic contract contained various provisions relating to the road drills. For example, it expressly provided that the road drill service would receive the local freight rate; that conductors working on road drills would be allowed time for lunch; and that a road freight conductors' seniority district was established at Elizabethport. Also, it made provisions for the exercise of seniority in choice of "runs". (Exhibit T-1 · Rule 12, p. 12; Rule 23, p. 17; Rule 35, p. 20; and Rule 36, p. 21. See also Rules 14-17, pp. 14 and 15.) The soundness of such finding is further shown by the practical considerations that road conductors had always manned the road drill jobs, were selected from the road freight conductors' seniority roster, were paid road rates and worked under the applicable road rules. (Ex. P-5.)

Furthermore, in the arbitration award made by the United States Board of Arbitration on April 26, 1929, relating to these very road drills, the carrier as one of the arbitrators joined in a finding that rule 9 (c) of the B. R. T.'s basic agreement (T-9, p. 11), which is identical with Rule 12(c) of the O. R. C.'s basic agreement (T-1, p. 12), except that in the latter agreement the word "conductors" is substituted for the word "trainmen", provided for the payment to brakemen of freight rates (road rates) for the *road drill service* (Ex. T-13, p. 2.) This was a recognition by the carrier that the drills in question constitute road service.

The March 7, 1940, memorandum, therefore, did not confer new rights upon the O. R. C. But even if it be held that the March 7, 1940 agreement gave to O. R. C. for the *first time* a contractual right to man the road drills in question, it was nevertheless a valid agreement. At the time it was made the road drills were manned by road engineers, road firemen, road conductors and road brakemen as they had been from the very inception of the service. (Ex. T-13, p. 2; Ex. P-4, p. 1, Ex. P-2 and R-7.) It provided that there would be no change in this working condition as

far as road conductors were concerned without agreement with the O. R. C. The carrier clearly violated the 1940 agreement and the basic O. R. C. agreement as well by its summary displacement of the road conductors without giving the 30 day notice required by law and the Circuit Court was correct in so finding.

B. The March 7, 1940 agreement does cover the road drills in controversy.

The carrier also argues (Carrier's brief, pp. 14 and 15) that the March 7, 1940, is indefinite and does not cover the road drills in question. This contention, it will be noted, is now being made for the *first time.* No such contention was made in the carrier's answer to the original complaint in the case. In such answer, the carrier asserted "That the said agreement of March 7, 1940, containing provisions as to making no other changes from the existing method of assigning Conductors to service in the territory described in said exhibit, could not, jurisdictionally, be binding upon the B. of R. T. * * *." (R. 15.)

The carrier's Assistant Vice President Falck, under date of August 5, 1940, advised O. R. C. (Ex. P-2 and R. 7), that it had conceded to B. R. T., *representing both road and yard brakemen,* the right to say whether the five road drills in question would be manned with road or yard brakemen but at the same time stated:

> "I refused, in accordance with *our understanding,* to permit them [BRT] to man the road drills or these *five crews* with *yard* conductors." (Emphasis supplied.)

What was the "understanding"? Obviously the carrier was referring to the March 7, 1940, memorandum which had provided that there would be no change in working conditions with respect to these *five road drills,* insofar as the class and craft of road conductors was concerned, without an agreement therefor with O. R. C., and the Master so found. (R. 43.)

The carrier's Assistant Vice President Falck testified upon the trial with respect to the March 7, 1940, agreement,

> "Now, the preamble takes in the territory of all of the service on the Perth Amboy Branch, Bayway and points South, and all of the service on the Sound Shore Railroad, so that all of those crews down in that territory are covered by this statement 'no other change' *as well as these five crews who happened to be working just north of Morse's Creek;* * * *." (Rec. of App.; C. C. A. p. 223) (Emphasis supplied.)

There is no basis for the argument now advanced by the carrier, in a desperate attempt to extricate itself from the position in which its Assistant Vice President Falck deliberately placed it, that the March 7, 1940, agreement was not intended to preserve the *status quo* of the *road conductors* in the manning of the five road drill jobs in question.

C. The basic agreements of O. R. C. and B. R. T. with the carrier as supplemented by the establishment of switching limits did not confer upon the B. R. T. the right to man the road drills in controversy.

Also in support of its contention that the Circuit Court's finding is erroneous, the carrier relies upon the basic agreements of O. R. C. and B. R. T. with the carrier as supplemental by the establishment of switching limits in 1929. (Carrier's brief, p. 17.) The B. R. T. also relies upon the establishment of such limits. (B. R. T.'s brief, p. 17.) Neither party attempts, however, to meet the argument in our main brief that their construction of such basic agreements and of the establishment of switching limits is erroneous, and contrary to the interpretation placed upon such basic agreements by the Director General of Railroads.

Moreover, it is extremely significant that when the B. R. T. for the first time on January 17, 1940 requested the displacement of road conductors by yard conductors, they did not predicate their claim upon the establishment of switching limits in 1929. (Ex. R-2.) It is also significant

that when the carrier in 1940 permitted the B. R. T. to substitute yard brakemen for road brakemen on these drills, it assigned as its reason not the basic agreement with the B. R. T. nor the fact that the establishment of switching limits required such result, but rather the fact that the B. R. T. had jurisdiction over both *road brakemen* and *yard brakemen* and therefore could decide which of the two groups should work on the drills. (Ex. P-3, p. 3.)

We submit that the real reason for B. R. T.'s assertions will not be found in any rule in the basic contracts, but will be found in the action taken by its convention wherein it announced as a policy that it would claim exclusive jurisdiction for its yard men within the entire New York Harbor Terminal territory and within twenty-five miles of New York City Hall. In the carrier's letter of August 30, 1940 to President Whitney of the B. R. T. it was stated, with reference to B. R. T.'s demand for the removal of not only the *road conductors* but the *road brakemen* as well,

> "* * * in fact, General Chairman Johnson took the position that he would claim jurisdiction under some act of your convention anywhere within 25 miles of New York City Hall." (Ex. P-3, p. 3)

We should like now to deal with the misleading quotation in the B. R. T.'s brief from the testimony of O. R. C.'s witness Williams appearing on page 17 of the B. R. T. brief. The implication is sought to be drawn from such testimony that the witness testified that the purpose of establishing switching limits was to exclude road conductors from working inside the switching limits, including working on the drills in controversy. That no such *inference* can be drawn from the quoted testimony is made abundantly clear by an examination of the testimony given by him both *before* and *after* that quoted by the B. R. T. Thus *immediately before* the quoted testimony the witness testified that road service *does* include service within switching limits so long as road rates are paid therefor and that the running of the drills in controversy was road work because

road rates were paid therefor. The following quotations from his testimony are pertinent:

"Q. Road service is not service within switching limits, is it? A. It may be.

"Q. What? A. Oh, yes. (Rec. of App.; C. C. A. p. 343)

"Q. Then these rules don't apply to drilling them into industries as road conductors, do they? There are no rules for that? A. Wherever road rates apply to service it is road service, no difference where it is at, inside or outside the yard." (Rec. of App.; C. C. A. p. 344)

* * * * * * * * *

"Q. Do you mean to say that the running of these five drills within the switching limits of the Elizabethport yard, the Bayway drills and the Standard Oil drills, do you mean to say that that's road work? A. Absolutely, because they have always drawed road pay and worked under road rules.

"Q. Oh! So what you say distinguishes road work and yard work or switching work,—the thing that determines which it is is the rate of pay they get, yes or no? A. That's what General Order 27 said when they handed down that rule. They said what is meant by the word road service, and the answer is 'Any service paid road rate'." (Rec. of App.; C. C. A. pp. 365-366.)

Moreover, on the purpose of establishing switching limits the witness testified as follows:

"Q. As an official of the C. R. C., also as a member of this Adjustment Board, the real purpose of switching limit boundaries is to show the line of demarcation between yardmen and roadmen, is that right? A. The reason for switching limits goes back to the day of the Railroad Administration during the first war. Many railroads had different kind of rules; they would pay yardmen for going outside of the yards. Some would pay them a day for maybe an hour's work, and the Railroad Administration, together with the organization's representative agreed upon Article 20(b); and that Article 20(b) couldn't be made applicable unless there were switching limits established." (Rec. of App.; C. C. A., pp. 362-363)

Then immediately *following* the testimony quoted by the B. R. T., the witness testified as follows:

> "Q. And you knew that that line, when you entered into this agreement, you knew that that line, the southerly line, was Morse's Creek, of the switching limits of Elizabethport? A. I did not. The change of switching limits was established, but switching limits doesn't have one thing to do with anybody's seniority, not one thing to do with anybody's seniority." (Rec. of App., C. C. A., p. 408.)

Clearly then, the implication which the B. R. T. seeks to draw from the testimony it quotes is completely erroneous. Far from having testified that the establishment of switching limits excluded road conductors from the drills in controversy, the witness testified just the opposite. When all the testimony given by him is read and not merely an excerpt extracted from its context, it is patent that the witness testified that the purpose of establishing switching limits was not that which the respondents contend but it was merely to provide a basis for the imposition of a penalty against the carrier where yard men were used in road service. It will also be observed that Mr. Williams's testimony is fully in accord with the interpretation of Rules 28 and 34 of the basic agreements of the B. R. T. and O. R. C., respectively, with the carrier, which was given such rules by the Director General of Railroads. Such interpretation by the Director General is fully presented in our main brief at pp. 33 and 34.

But aside from the testimony of Mr. Williams, the Court will note that for 11 years after switching limits were established, i.e. 1929 to 1940, just as had been true for many years before that, the road drills were manned by road conductors without protest from the B. R. T. It is unreasonable to believe that if the purpose of establishing switching limits was to exclude all road service from within the switching limits, B. R. T. would not have raised its voice in protest long ago. Hence, when the carrier here sought

in 1943 to change the long concurred in existing working conditions of the O. R. C. road conductors in manning these drills, it was required to comply with the procedure prescribed by Section 6 of the Railway Labor Act. Having failed to do this, O. R. C. is entitled to the requested relief requiring the carrier to pursue such procedure if it desires to change the working conditions of road conductors.[5]

II. The question of the "transfer runs".

From the inception of this litigation B. R. T. as intervenor has attempted to confuse the issue in the case by seeking to introduce an entirely different subject matter relating to certain so-called transfer runs. Its argument seems to be that if the March 7, 1943, agreement between the B. R. T. and the carrier changed working conditions, so did the March 7, 1940, agreement between the O. R. C. and the carrier insofar as it conferred upon the O. R. C. the right to man such transfer runs. Precisely what the B. R. T. hopes to gain by this argument concerning the

[5] The B. R. T. referred to an award of the First Division of the National Railroad Adjustment Board in support of its contention that road men are excluded from working within the switching limits. The award in question was Award No. 7830 and is referred to on page 16 of the B. R. T. brief. It will be noted, however, that the controversy there was between *yard brakemen* and *road brakemen* both of whom are represented by the B. R. T. In that controversy the service in question was not one that had been classified by long years of practice and custom as either yard service or road service. Moreover, the record in that case showed that the yard brakemen did not claim the exclusive right under all circumstances to perform all work within the switching limits. They only claimed the right "where Road Freight Trainmen hold no seniority". In the case at bar there is no question that the road conductors held seniority on the road drills in question, since they had manned them uninterruptedly for 35 to 40 years before the present controversy arose. Award No. 3633 of the Adjustment Board, also cited by the B. R. T. (B. R. T. brief, p. 16), can also be of no comfort to the B. R. T. In that case the Board found that it was not the *practice* for road crews to perform work of the nature forming the basis of the claim. Here, however, we have shown that it was the long established practice of O. R. C. to man the drills in controversy.

transfer runs is not clear. Such runs have nothing whatever to do with the five road drill jobs in controversy and arise out of an entirely different set of circumstances.

In any event the record shows conclusively that the B. R. T.'s argument on this matter is wholly erroneous and that in fact the O. R. C. road conductors always had the right to man the transfer runs. Under its basic agreement with the carrier the O. R. C. was given such right. In fact both Rule 28 of the B. R. T. basic agreement and Rule 34 of the O. R. C. basic agreement make it clear that such transfer runs, which have always been *classified as road service*, should not be manned by yard men. Hence, when for several years between 1935 and 1940 the yard men manned these transfer runs, over the immediate and continuous protest of O. R. C., the basic agreements of both unions were in fact being violated. The sole effect of the March 7, 1940, agreement between the O. R. C. and the carrier, insofar as it related to these transfer runs, was to recognize and restore the always existing right of the road conductors to man such runs. At p. 13 of its brief the carrier concedes this.[6]

Respectfully submitted,

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November, 1945.

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[6] The full history relating to these transfer runs is set forth in the letter of April 4, 1941, written by the carrier's Vice President Falck (Ex. P-4, p. 2). Immediately upon the road conductors being displaced from the transfer runs, O. R. C.'s General Chairman orally protested and followed the oral protest with a formal written protest dated June 3, 1936 (Ex. P-9). Also the Presidents of both O. R. C. and B. R. T. claimed that the displacement of road men from the transfer runs violated the basic agreements (Ex. P-10). The International Tribunal of B. R. T. later reversed the position taken by its President on this matter as far as the brakemen were concerned and O. R. C. proceeded with the claim alone on behalf of its road conductors (Ex. P-4, p. 4).